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7 **UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

9 Justin Downing, individually and on behalf  
10 of all others similarly situated,

Case No. 3:22-cv-08159-SPL

11 *Plaintiff,*

12 v.  
13  
14 **REPLY IN SUPPORT OF MOTION**  
15 **FOR CERTIFICATION OF FED. R.**  
16 **CIV. P. 54(B) JUDGMENT**

14 Lowe's Home Centers, LLC, a North  
15 Carolina limited liability company, and  
16 First Advantage Corporation, a Delaware  
corporation,

17 *Defendants.*

19 **I. INTRODUCTION**

20 Defendant Lowe's Home Centers, LLC's ("Defendant" or "Lowe's") opposition to  
21 the entry of Rule 54(b) judgment concedes that the Court's Order granting its motion to  
22 dismiss (dkt. 29) ("Order") constitutes an "ultimate disposition" of the claims against  
23 Lowe's (opp. at 2, n.1), yet it will not consent to the entry of judgment. Instead, Lowe's  
24 claims that judicial administration will not be served by piecemeal appeals and that there is  
25 no equitable justification for an early appeal. These arguments miss the mark and lose focus  
26 of the central purpose of Rule 54(b), which "was adopted 'specifically to avoid the possible  
27 injustice of delaying judgment on a distinctly separate claim pending adjudication of the  
28 entire case.... The Rule thus aimed to augment, not diminish, appeal opportunity.'" *Merrick*

1       *v. Inmate Legal Servs.*, No. CV-13-01094-PHX-SPL, 2018 WL 10344746, at \*1 (D. Ariz.  
 2 Apr. 4, 2018) (Logan, J.) (quoting *Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 628 (9th Cir.  
 3 2015) (cleaned up)).

4           First, judicial administration would undoubtedly be served by the entry of judgment  
 5 because there is no risk of piecemeal appeals. As Lowe's admits, the claims at issue are  
 6 wholly distinct from the claims against the other defendant, First Advantage. (Opp. at 3.)  
 7 For this reason, there is no risk that the appellate court will be required to hear multiple  
 8 appeals “which should be reviewed only as single units”. Rather, delaying the entry of  
 9 judgment will only result in a duplication of the appellate court’s burden at a later date by  
 10 merging two distinct appeals into one cumbersome appeal. This does not serve judicial  
 11 economy.

12          Second, Lowe's fails to properly weigh the risks of delay against the alternative to  
 13 an appeal. Instead, it asserts that Plaintiff has failed to allege enough harm from continual  
 14 delay—which it claims is present in any denial of Rule 54(b) certification. This argument  
 15 ignores the risk of prejudice associated with delay. The risk is not that some delay will  
 16 occur, but rather that the delay is likely to be significant. Indeed, this is an alleged class  
 17 action in which discovery has not yet commenced. The First Advantage claims could take  
 18 years to be resolved—all without any possibility that further facts or issues will be  
 19 developed in the underlying litigation that would be relevant to the Lowe's appeal. Again,  
 20 the claims against Lowe's do not overlap in any way with the claims against First  
 21 Advantage. Put simply, there is no reason, let alone a “just reason to delay” the entry of  
 22 judgment. *Gonzalez v. US Hum. Rts. Network*, No. CV-20-00757-PHX-DWL, 2021 WL  
 23 1312553, at \*2 (D. Ariz. Apr. 8, 2021).

24          For these reasons and as set forth below, the Court should grant the instant motion  
 25 and enter judgment with respect to Counts I and II of Plaintiff's complaint.

1           **II. ARGUMENT**

2           **A. Because the Lowe's claims are distinct from the First Advantage claims,  
3           there is no risk of piecemeal appeals and judicial economy would be  
4           served by the entry of judgment.**

5           Lowe's first asserts that "judicial administration" would not be served because a Rule  
6           54(b) judgment will not streamline the overall case, even if it "would hasten the final  
7           resolution of the Lowe's claims." (Opp. at 2.) This argument misunderstands "judicial  
8           administration" and the effect of a denial of Rule 54(b) certification.

9           "The principle of sound judicial administration requires the court to consider  
10          'whether the claims under review [are] separable,' legally and factually, and whether  
11          granting the Rule 54(b) request might result in multiple appellate decisions or duplicate  
12          proceedings on the same issues." *Found. of Hum. Understanding v. Talk Radio Network,*  
13          Inc., No. 1:20-CV-01652-AA, 2023 WL 2207636, at \*1 (D. Or. Feb. 24, 2023) (citing  
14          *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)). Generally speaking, the  
15          judicial administration inquiry works to "prevent piecemeal appeals in cases **which should**  
16          **be reviewed only as single units.**" See *Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th  
17          Cir. 2005) (quoting *McIntyre v. United States*, 789 F.2d 1408, 1410 (9th Cir. 1986)  
18          (emphasis added)); see also *Vawter v. Quality Loan Serv. Corp. of Washington*, No. C09-  
19          1585JLR, 2010 WL 11523625, at \*1 (W.D. Wash. May 24, 2010) (finding that the judicial  
20          administration inquiry involves "such factors as (1) whether the claims under review are  
21          separable from the others remaining to be adjudicated; and (2) whether the nature of the  
22          claims already determined is such that no appellate court would have to decide the same  
23          issues more than once."); *Modoral Brands Inc. v. Swedish Match N.A. LLC*, No.  
24          220CV08729SBMRW, 2022 WL 2188539, at \*5 (C.D. Cal. Mar. 1, 2022) ("Relevant  
25          factors may include 'whether the claims under review were separable from the others  
26          remaining to be adjudicated and whether the nature of the claims already determined was  
27          such that no appellate court would have to decide the same issues more than once even if  
28          there were subsequent appeals.'").

Contrary to Lowe's claim, certification of the Lowe's Order does not present the danger of piecemeal appeals. Rather, as Lowe's agrees, there is no overlap between the claims at issue and the claims brought against First Advantage. (Opp. at 3.) For this reason, the case is not going to come back to the Ninth Circuit on the same set of facts nor will it ever be reviewed as a single unit. Rather, the alternative to Rule 54(b) is to allow the Lowe's claims to languish for potentially years, solely so they can be packaged together in a potential appeal at a later date with the First Advantage claims. But Lowe's does not explain how this would streamline the case or the appeal process. It would not. Rather, delaying judgment will only multiply the appellate court's burden down the road. Indeed, each appeal would involve separate facts and legal issues, and both Lowe's and First Advantage would be permitted to file separate briefs. Put simply, the facts and the claims are wholly distinct and there is no risk that the appellate court will have to decide the same issues more than once.

Furthermore, Lowe's is also incorrect when it claims that an appeal will not streamline the overall case because it "would have little bearing on the remaining claims" against First Advantage (opp. at 3)—which is true of every case in which the claims are distinct. What Lowe's ignores is that the overall time to resolve the underlying subject matter of the case will be reduced, which serves judicial economy. *See Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (finding that the district court's equities determination was proper where "the factual bases of many of the claims differ as to each defendant" and an early appeal of a portion of the claims would streamline the overall duration of the underlying subject matter of the case). Here, requiring the appeal of the Lowe's claims to await a determination of the First Advantage claims will only lengthen the overall duration of the case as a whole.

Even under Lowe's desired approach, the claims would be at vastly different stages of litigation at the time of appeal. Indeed, Plaintiff and First Advantage will have litigated their claims through all discovery, class certification, and summary judgment. If the Ninth Circuit were to reverse any potential order with respect to First Advantage, its claims would

1 still be near the finish line on remand. But the Lowe's claims would be in their infancy on  
 2 remand. Hence, even under Lowe's approach, there is no conservation of resources. It is  
 3 thus far more efficient to have the appeal of the Lowe's claims taken up as soon as possible.

4 Accordingly, judicial administration would be served by permitting the Lowe's  
 5 claims to be appealed now.

6 **B. The equities tilt decidedly in favor of entering Rule 54(b) judgment.**

7 Next, Lowe's asserts that there is no equitable justification for an early appeal  
 8 because Downing has not identified any "harsh or unjust result that would occur by  
 9 following the ordinary course of appeal." (Opp. at 3.) In making this argument, Lowe's  
 10 ignores that the equities must be weighed against the alternative to an appeal. *See Gonzalez*  
 11 *v. US Hum. Rts. Network*, No. CV-20-00757-PHX-DWL, 2021 WL 1312553, at \*5 (D. Ariz.  
 12 Apr. 8, 2021) ("The Court finds that, on balance, the equities tip in Plaintiff's favor."); *Wood*  
 13 *v. GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005) ("The role of the court of appeals is  
 14 'not to reweigh the equities or reassess the facts but to make sure that the conclusions  
 15 derived from those weighings and assessments are juridically sound and supported by the  
 16 record.'" (citation omitted) (emphasis added)).

17 Here, Lowe's can't point to any benefits or judicial economy that would be served  
 18 by delaying the entry of judgment (there are none). Instead, it asserts that Plaintiff hasn't  
 19 demonstrated sufficient hardship (monetary or otherwise) that would result from delaying  
 20 judgment (Opp. at 3-4.) Lowe's ignores the risks of prejudice. As explained in his original  
 21 motion, a lengthy delay will prejudice the parties in the form of unavailability of witnesses,  
 22 the potential loss of pertinent records, and faded memories. *See Pagtalunan v. Galaza*, 291  
 23 F.3d 639, 643 (9th Cir. 2002) ("Unnecessary delay inherently increases the risk that  
 24 witnesses' memories will fade and evidence will become stale." (citations omitted)).

25 In response, Lowe's—relying on *Alexander v. City of Mesa*, No. CV-14-00754-  
 26 PHX-SPL, 2015 WL 13655444 (D. Ariz. Nov. 6, 2015)—asserts that prejudice from delay  
 27 "would apply in virtually every situation in which a portion of the case is dismissed and  
 28 others proceed". (Opp. at 4.) This argument misses the point. The issue is not that some

1 delay will exist, the issue is that the delay could be substantial. Indeed, a lengthy delay  
2 weighs in favor of granting the instant motion. *Compare Moriarty v. Hashemite Kingdom*  
3 *of Jordan*, No. CV 18-2649 (CKK), 2019 WL 6701339, at \*2 (D.D.C. Dec. 9, 2019) (finding  
4 that the equities weigh in favor of granting rule 54(b) certification based on “the potential  
5 for a **lengthy delay** in the resolution of the remainder of Plaintiffs’ claims” (emphasis  
6 added)), *with Alexander*, 2015 WL 13655444 at \*2 (finding that the equities weigh against  
7 granting Rule 54(b) certification because “there is limited discovery outstanding and a  
8 determination on it will be accomplished in the not so distant future.”).

9 In this case, the First Advantage claims are in their infancy and discovery has yet to  
10 commence. Plaintiff and First Advantage will likely propose a yearlong discovery period to  
11 be followed by briefing on class certification and then briefing regarding dispositive  
12 motions. In total, the remaining claims could take years to resolve—all without any chance  
13 that the litigation will develop any facts or issues relevant to the Lowe’s appeal. Instead, the  
14 claims will stagnate only to ultimately be lumped in with the First Advantage claims, which  
15 as explained above, will not conserve appellate resources in any substantial manner.

16 On balance, the risks of prejudice from delaying the entry of judgment far outweigh  
17 the benefits of delaying judgment. Accordingly, the equities weigh in favor of granting the  
18 instant motion.

### 19 III. CONCLUSION

20 Defendant’s arguments against Rule 54(b) certification fall flat. Because the Lowe’s  
21 claims are completely distinct from the First Advantage claims, there is no risk of piecemeal  
22 appeals and the equities tip in favor of the entry of judgment. As such, the Court should  
23 grant the instant motion and enter judgment against Plaintiff and in favor of Lowe’s with  
24 respect to Counts I and II of the complaint.

1 Dated: July 21, 2023

JUSTIN DOWNING, individually and on  
behalf of all others similarly situated,

2 By: /s/ Patrick H. Peluso

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1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on July 21, 2023, a true and correct copy of the above papers  
3 was served upon counsel of record by filing such papers via the Court's CM/ECF system.

4                   /s/ Patrick H. Peluso

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